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RECENT CASES.

ADVERSE POSSESSION—MISTAKEN BOUNDARY—Adjoining owners of land planted a hedge upon what they believed to be the true boundary line between their lots, which line was treated by them and their successors as the division line for over thirty years. The jury found that the parties occupied the land under a mistake as to the location of the true boundary and that there was no intention to claim to the hedge regardless of the location of the true line. *Held:* No title was acquired by adverse possession. Shanks v. Williams, 144 Pac. Rep. 1007 (Kan. 1914).

As to whether possession of land under mistake as to the boundary constitutes adverse possession, there is a clear conflict of authority. One line of cases holds that the motive of the possessor is immaterial and that actual possession under a claim of right is hostile and adverse. French v. Pearce, 8 Conn. 439 (1831); Reiter v. McJunkin, 173 Pa. 82 (1896). The other view makes the *quo animo* in which possession was taken the test of its adverse character and requires a claim of right hostile to the owner. Grube v. Wells, 34 Ia. 148 (1871); Winn v. Abeles, 35 Kan. 85 (1886). The latter rule would seem fallacious in that it puts a premium upon conscious wrongdoing, besides being difficult in its practical application, and is in the decided minority. See 2 Tiffany on Real Property, §443. The principal case, in following the latter view, adopts the rule laid down in Edwards v. Fleming, 83 Kan. 653 (1911), where the test applied was whether a party claimed up to a fence only upon the supposition that it was the true boundary or whether his intention was to hold to the fence in any event. It is held that where parties agree, though by parol only, upon a division line and afterwards hold possession conforming to it, the possession is adverse. Boston & W. R. Corporation v. Sparkawk, 46 Mass. 469 (1843); and that an agreement to relocate the line, made before action is barred, is sufficient to prevent the running of the statute of limitations. Baty v. Elrod, 66 Neb. 735 (1903).

BILLS AND NOTES—FORGERY—DOCTRINE OF *Price* v. *Neale*—The Secretary of the Treasury paid a draft purporting to have been drawn upon him by the American consul in Argentina, to the defendant, a holder in due course. The signature of the consul had, in fact, been forged. *Held:* The United States cannot recover back the money so paid. United States v. Bank of New York, 219 Fed. Rep. 648 (1914).

It was very early laid down in the well known case of Price v. Neale, 3 Burrows, 1354 (Eng. 1762), that a drawee in accepting a draft conclusively admits the genuineness of the drawer's signature and cannot recover back money paid on the faith of it. This rule has been almost universally followed and has been embodied in the Uniform Negotiable Instruments Law, §79, though repudiated in North Dakota. First Nat. Bank v. Bank of Wyndmere, 108 N. W. Rep. 546 (N. D. 1906). An exception is made where the negligence of the holder has assisted in the perpetration of the fraud, Myers v. Natl. Bank, 193 Pa. 1 (1899); Bank v. Bangs, 106 Mass. 441 (1871). To induce the court to depart from Price v. Neale in the principal case the interesting argument was advanced that because of the multiplicity of its dealings, the United States could not be assumed to know the signatures of all who drew upon it; and the case of United States v. Natl. Exchange Bank, 214 U. S. 302 (1909), where the government was allowed to recover back money paid on forged pension checks, was cited as authority. In that case, however, the court expressly said: "The United States is not before us as the acceptor of a draft drawn upon it and charged with knowledge of the signature of the drawer. . . . The forgery here was in the name of the payee." So that case was clearly no authority for the situation of an acceptor,

and the rule of Price v. Neale was adhered to by the court. While a bill of lading attached to a draft is generally held to be independent thereof insofar as the liability of the acceptor is concerned, Hoffman v. Bank of Milwaukee, 79 U. S. 18 (1870); Springs v. Natl. Bank, 209 N. Y. 224 (1913); where the draft was indorsed "acceptance against indorsed bills of lading" it was held that the acceptance was conditioned upon the genuineness of the signatures on the bills of lading which the acceptor could not be presumed to know. Guaranty Trust Co. v. Grotrian, 114 Fed. Rep. 433 (1902).

BILLS AND NOTES—PERSONS LIABLE AS MAKERS—The president of a corporation signed his own name, without qualification, to a promissory note, immediately below the corporate name. *Held:* The president is *prima facie* personally liable as maker. Belmont Dairy Co. v. Thrasher, 92 Atl. Rep. 766 (Md. 1914).

It is universally held that one who signs a negotiable instrument, without limitation or qualification, is personally liable. Morell v. Coddington, 86 Mass. 403 (1862); Fulton v. Loughlin, 20 N. E. Rep. 796 (Ind. 1889). Signing one's name, without more, below the corporate name is not regarded as a mere authentication of the corporation's signature, and the weight of authority favors the view that even if an official designation be attached to the signature, the signer is still personally liable. Taylor v. Reger, 48 N. E. Rep. 262 (Ind. 1897); Duffner v. Ball, 86 Ill. App. 519 (1899). But there are a number of decisions which exempt the signer from personal liability, under these circumstances. Gleason v. Sanitary Milk Supply Co., 93 Me. 544 (1900); Williams v. Hipple, 17 Pa. Super. Ct. 81 (1901). The rule, as generally laid down, is that a representative, in order to exempt himself, must do so in express terms or, at least, by plain if not necessary implication. Slawson v. Loring, 87 Mass. 340 (1862); Hately v. Pike, 162 Ill. 241 (1896). Merely affixing a title does not relieve one from liability; it is only *descriptio personae*. Leffner v. Brownell, 70 Iowa, 591 (1887); Hopson v. Johnson, 110 Ga. 283 (1899). *Contra:* State v. Jahraus, 117 La. 286 (1906); Mortgage and Investment Co. v. Loan and Trust Co., 97 N. W. Rep. 612 (Neb. 1903). But it is well settled that where the representative prefixes the word *"per"* or "by" to his signature, he is not personally liable. Williams v. Harris, 198 Ill. 501 (1902); Trust Co. v. Caroline, 137 N. Y. Supp. 932 (1912).

The Negotiable Instruments Law, §20, provides that where it is shown on the instrument that the signer acted in a representative capacity, he is not liable personally, if he was duly authorized so to act. As between the original parties, evidence *aliunde* is admissible to prove that the apparent maker was merely a representative. Megowan v. Peterson, 173 N. Y. 1 (1902). But in cases similar to the principal case, subsequent to the act, this provision seems to be ignored. Western Grocer Co. v. Lackmar, 75 Kans. 34 (1907); Dunbar Co. v. Martin, 53 Misc. Rep. 312 (N. Y. 1907).

CONTRACTS—ILLEGALITY—The defendant was manager for the plaintiffs, who were auctioneers. By an agreement between them, the defendant was to be at liberty to undertake the office of trustee in bankruptcy matters, his fees therefrom to be pooled with any fees the plaintiffs might receive for services to such estate, and then divided between the plaintiffs and the defendant, provided that before any such division should take place, there should, out of the proceeds be paid to the plaintiffs the balance of any debt due to them from such estate, *i. e.* over and above the dividends which they would receive as ordinary creditors. *Held:* That the agreement was void as being not only prejudicial to the other creditors but also as being inconsistent with public law and arrangements. Farmer's Mart, Ltd., v. Milne, 111 L. T. 871 (Eng. 1915).

An agreement generally will be illegal, if it contemplates any civil injury to third persons. Torpey v. Murray, 93 Minn. 482 (1904). Among this class of illegal agreements are those in fraud of creditors. Brown v. Nealley, 161 Mass. 1 (1894); Vreeland v. Turner, 117 Mich. 366 (1898). Hence a contract

between a solvent debtor and a trustee to whom he conveyed his property with authority to convert the same into cash and pay creditors, which bound the trustee to settle with the creditors as cheaply as possible and give the benefit of discounts procured from creditors, is illegal and void because tending to lead the trustee to deal unjustly with the creditors. Haswell v. Blake, 90 S. W. Rep. 1125 (Tex. 1905). With regard to composition of creditors, each creditor consents to lose part of his debt in consideration that the others do the same and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by the others. Where any creditor in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void and he cannot take advantage of it. Mallalieu v. Hodgson, 20 L. J. Q. B. 339 (Eng. 1851); Huntington v. Clark, 39 Conn. 540 (1873). Moreover, the other creditors who know nothing of the fraud and enter into the arrangement on the assumption that they are contracting on terms of equity as to each and all, are not bound by the composition under such circumstances and they may sue for and recover the full amount of their original claims less the amount received under the composition agreement. Kullman v. Greenbaum, 92 Cal. 403 (1891); Woodruff v. Saul, 70 Ga. 271 (1883). And this is true even if the additional payment is to be made at the expense of a third person, provided that the bargain is made with the debtor's knowledge. *Ex Parte* Milner, 15 Q. B. D. 605 (Eng. 1885); Brown v. Nealley, *supra*.

CORPORATIONS—POWERS OF PRESIDENT TO ISSUE NEGOTIABLE PAPER—The president of a corporation negotiated notes in the corporate name without authority. *Held:* These notes are not enforceable against the corporation because the president had no power, express or implied to issue them. Williams v. S. M. Smith Ins. Agency, 84 S. E. Rep. 235 (W. Va. 1915).

This decision is in accord with the great weight of authority, the general rule being that unless the president is authorized by the board of directors to make contracts, issue notes, *etc.*, or unless his action is ratified by the board, that the corporation will not be bound. So, it has been held that the president of a bank has no implied power to borrow money for it. Western Nat. Bank v. Armstrong, 152 U. S. 346 (1893); nor has the president of an insurance company the power to accept a policy of insurance for it. Kline Bros. & Co. v. Royal Ins. Co., 192 Fed. Rep. 378 (1911); nor has the president of a bank power to issue notes in the name of the bank. National Bank of Atkinson, 55 Fed. Rep. 465 (1893); nor has the president of a corporation power to execute a mortgage, Corbett v. Woodward, 5 Sawyer, 403 (1879); nor to sell corporate property. Drennen & Co. v. Jasper Ins. Co., 153 Ala. 322 (1907); nor to confess judgment. Arizona, *etc.*, Co. v. Benton, 12 Ariz. 373 (1909); nor to buy real estate for the corporation. McKibbin v. Hulton, *etc.*, Co., 227 Pa. 153 (1910).

But the fact that the president is usually the man whose name appears on contracts authorized by the board of directors has caused this rule to break down in some jurisdictions. New York takes the position that a contract which appears on its face to be a corporate contract is binding on the corporation when signed by the president until the corporation can show that it was neither authorized or ratified, *i. e.*, the burden of proof is shifted. Patterson v. Robinson, 116 N. Y. 193 (1889). Illinois goes still further and holds that by virtue of his office the president of a corporation has the implied power to sign notes and make contracts. Loyd & Co. v. Matthews, 223 Ill. 477 (1908), and this is clearly *contra* to the general rule, but is designed to protect the man who deals in good faith with the president of a corporation.

Where the president is authorized to act by the board of directors all jurisdictions hold that the corporation is bound. Chestnut, *etc.*, Co. v. Record Pub. Co., 227 Pa. 235 (1910); McCormick v. Stockton, *etc.*, R. R., 130 Cal. 100 (1900). And the corporation is bound if it accepts the contract after

it is made or the benefits of such a contract. Varney v. Lumber Co., 70 W. Va. 169 (1911); Black v. Harrison Howe Co., 155 Cal. 121 (1909); 3 Cook on Corporations (7th ed.), 2500.

COVENANTS—MISTAKE OF LAW—Property was sold with a covenant against incumbrances. There was at this time an unsatisfied judgment, but the vendor did not know that it was a lien on the land. The vendee, losing the property as the result of the lien, brought suit upon the covenant against incumbrances. *Held:* The vendor is not relieved from liability upon the covenant because the breach resulted from a mistake of law. White v. Murray, 218 Fed. Rep. 933 (1914).

The general rule is well settled that mere ignorance or mistake of law will not of itself relieve one of liability upon a contract. Machin v. Dwyer, 205 Mass. 472 (1910); Berks Turnpike Road v. Telephone Co., 240 Pa. 228 (1913). Other circumstances must combine with the mistake of law before relief will be given. Stephenson v. Coal Co., 147 Ala. 432 (1906). Where, however, there is a mistake of law on one side, and either positive fraud or inequitable conduct on the other side, equity will afford relief, as by reforming the agreement. Schuttler v. Brandfass, 41 W. Va. 201 (1895); Weeke v. Wortmann, 84 Neb. 217 (1909). A mistake as to the laws of another state or a foreign country is considered as a mistake of fact against which relief will be granted. Rosenbaum v. Credit Co., 65 N. J. L. 255 (1901).

A distinction has been drawn between a mistake of law as to the legal effect of the contract actually made, and a mistake of law in reducing the contract to writing so that it does not carry out the intention of the parties. In the latter case, the mistake is not in the actual contract, but in putting it into such form as to have an effect in law contrary to that which the parties desired. Consequently, a court of equity will in its discretion reform the instrument so as to effectuate the intention of the parties. Spaulding v. Godbold, 92 Ark. 63 (1909); Allis v. Hall, 76 Conn. 322 (1903); Condor v. Secrest, 149 N. C. 201 (1908). This is true especially where failure to do so would give an unconscionable advantage to one party and operate as a gross injustice to the other. Dolvin v. American Co., 125 Ga. 699 (1906). But if there has been no fraud, equity will not grant relief unless the mistake is mutual. Hansbrandt v. Hofler, 117 Ia. 103 (1902).

CRIMINAL LAW—ACCOMPLICES—A conspiracy was formed to bribe a police officer to stand trial on certain charges and not testify against men "higher up". The defendant was used as a "go between" to carry money to the police officer. *Held:* He was not an accomplice. Though informed that an effort was being made to induce the officer not to be a witness, he was merely a messenger with such knowledge only as was necessary intelligently to convey his message. People v. Sweeney, 106 N. E. Rep. 915 (N. Y. 1915).

The question of whether a man be an accomplice or not becomes important in the law of evidence because of the fact that, in order to convict, the evidence of an accomplice must be corroborated. The general rule is that to constitute one an accomplice, one must be so connected with a crime that at common law he might himself have been convicted either as a principal or an accessory before the fact. People v. Bright, 203 N. Y. 73 (1912); State v. Jones, 88 N. W. 196 (Ia. 1901). So one giving a bribe is an accomplice of the bribe-taker. People v. Bissert, 172 N. Y. 643 (1902), and vice versa; People v. Winant, 53 N. Y. Sup. 695 (1898). One or more of several defendants jointly indicted are treated as accomplices so that one of them may not be convicted on the uncorroborated testimony of the others. Gilbert v. Com., 106 Ky. 919 (1899). But see *contra*, State v. Spotted Hawk, 22 Mont. 33 (1899). Parties who participate in forging a deed are accomplices of one who utters it. Preston v. State, 40 Tex. Cr. R. 72 (1898). In cases of misdemeanor, however, there can be no accomplices since all are principals. Bolton v. State, 43 S. W. Rep. 984 (Tex. 1898). One does not become an

accomplice by not disclosing the fact that a crime has been committed, Bird v. U. S., 187 U. S. 118 (1902). Nor because one had knowledge that a crime was about to be committed; one must have some guilty connection with the crime. Martin v. State, 200 U. S. 316 (1906). Refusal to testify about a crime does not constitute one an accomplice, Ruwett v. State, 41 Tex. Cr. R. 262 (1899); nor testifying falsely even with the intent to conceal the crime, Rhodes v. State, 11 Tex. App. 563 (1887); nor the mere agreement not to prosecute a burglar if he will return the goods stolen, provided there be no promise to testify falsely on his behalf. Holly v. State, 92 S. W. Rep. 422 (Tex. 1906). Neither are the following considered accomplices: a detective who, to discover crime ostensibly aids in its commission, Campbell v. Com., 84 Pa. 187 (1877); a woman upon whom an abortion has been committed, even with her consent, People v. Com., 87 Ky. 487 (1888); likewise in the case of a miscarriage, State v. Hyer, 39 N. J. L. 598 (1877); the prosecutrix in a prosecution for seduction, Keller v. State, 102 Ga. 506 (1898); the woman with whom one is charged with committing adultery, People v. Hendrickson, 53 Mich. 525 (1884); the willing partner in a prosecution for statutory rape, Hamilton v. State, 37 S. W. Rep. 431 (Tex. Cr. App. 1896); but the willing female participant in incestuous intercourse is considered an accomplice, Shelley v. State, 95 Tenn. 152 (1895).

CRIMINAL LAW—ADULTERY—A single man had unlawful sexual intercourse with a married woman. *Held:* He is guilty of adultery. State v. Bigelow, 92 Atl. Rep. 978 (Vt. 1915).

There is a conflict as to the effect upon the offense of adultery of the fact that but one of the parties to an unlawful sexual intercourse is married, Bashford v. Wells, 96 Pac. Rep. 663 (Kan. 1908). The authorities agree that a married woman, having intercourse with a man not her husband, is guilty of adultery. Hood v. State, 56 Ind. 263 (1877). The great majority of jurisdictions hold that an unmarried woman does not commit adultery by having intercourse with a married man. State v. Wallace. 9 N. H. 515 (1838); Adams v. Hannon, 3 Mo. 222 (1834): *Contra,* State v. Case, 122 Pac. Rep. 304 (Ore. 1912); but that an unmarried man commits adultery by having intercourse with a married woman. State v. Lash, 16 N. J. L. 380 (1838); Holden v. State, 29 Ohio St. 651 (1876), even though he did not know that she was married. Comm. v. Elwell, 43 Mass. 190 (1840). Some decisions hold that there can be no adultery unless the woman is married. State v. Armstrong, 4 Minn. 335 (1860); State v. Lash, *supra;* others hold that a married man having intercourse with an unmarried woman is guilty of adultery, Lyman v. People, 198 Ill. 544 (1902); State v. Ling, 138 Pac. Rep. 582 (Kan. 1914). In some jurisdictions only the married party can be guilty of adultery, *Ex parte* Sullivan, 117 Pac. Rep. 526 (Cal. 1911); the single party being guilty merely of fornication. Respublica v. Roberts, 1 Yeates, 6 (Pa. 1791).

In some states by express statutory provision both parties are guilty of adultery if one of them is married, State v. Wilson, 22 Iowa, 364 (1867); Fox v. State, 3 Tex. App. 329 (1878). In other jurisdictions by statute both are guilty of adultery if the woman is married, Comm. v. Rakeman, 131 Mass. 577 (1881); State v. Fellows, 50 Wis. 65 (1880). In others by express statute a married man having unlawful intercourse with an unmarried woman is guilty of adultery, State v. Thompson, 31 Utah, 228 (1907); the woman is guilty of mere fornication. U. S. v. Meyers, 99 Pac. Rep. 336 (N. M. 1909). By statute in Georgia to constitute adultery both parties must be married, Zackery v. State, 63 S. E. Rep. 930 (Ga. 1909).

CRIMINAL LAW—ADULTERY—CONNIVANCE OF HUSBAND—The husband of a woman connived with and abetted the defendant in the commission of adultery with her. *Held:* This is no defence to a criminal action against the defendant. State v. Ayles, 145 Pac. Rep. 19 (Ore. 1914).

While in a number of crimes such as robbery the consent of the party affected deprives an act of an element essential in constituting it a crime, Rex v. Fuller, R. & R. C. C. 408 (Eng. 1820), the broad maxim of the criminal law is that such consent is immaterial, Co. Litt. 127*a*; thus, killing another at his request. 1 Russell on Crimes, 670 (9th ed.). Nor is it a defence that the commission of the crime was purposely made more convenient, Rex v. Eggington, 2 Leach C. C. 913 (Eng. 1801); United States v. Wright, 38 Fed. Rep. 106 (1889); nor that the defendant was decoyed into committing the crime by solicitations, Grimm v. United States, 156 U. S. 604 (1895), or by detectives who pretend to abet in its commission. State v. Janson, 22 Kan. 498 (1879). Further, it is generally held that a subsequent condonation of a crime, whether or not it of necessity involves absence of consent as an essential element in its commission, is no defence. Com. v. Slattery, 147 Mass. 423 (1888). It has been held that subsequently remarrying a wife previously divorced with knowledge of her adultery with the defendant during the former marriage, did not constitute condonation by the husband and bar a criminal prosecution against the defendant. State v. Smith, 79 N. W. Rep. 113 (Ia. 1899), but as pointed out, the defences of prior consent and subsequent condonation rest different principles. The requirement that the prosecution must be instituted by the husband of the guilty party might have lent some color to the defendant's contention that consent was a defence; and further a statutory provision made adultery procured or incited by a plaintiff no ground for divorce. Such defence should avail, however, only on the assumption that the defendant was guilty of a crime against the husband; and the court's ruling is perfectly consistent with the elementary principle that a crime is an offence against the state. State v. Donovan, 61 Ia. 278 (1883).

EMINENT DOMAIN—NEW TAKING—SUBWAY—The City of Boston constructed a subway under streets in which it owns merely an easement, the fee being in the abutting owners. One of the abutting owners was obliged to remove his heating apparatus from under the street. *Held:* There was no new taking and the owner can recover no damages. Peabody v. City of Boston, 107 N. E. Rep. 952 (Mass. 1915).

As a general rule, when a city by its power of eminent domain takes the right of maintaining a street over a private owner's land, the public acquires the right to use the land so taken and paid for, for all reasonable means of transportation for persons and commodities which the advance of civilization may render suitable for a highway. Any other use is a new taking for which compensation must be made. Thus it has been held that an electric passenger railway is a legitimate use of a city or village street. Rafferty v. Central Traction Co., 147 Pa. 579 (1892), but not of a country road. Pa. R. R. Co. v. Montgomery Co. R. R. Co., 167 Pa. 62 (1896). Under this general rule the following uses are considered as reasonable and do not constitute a new taking. Commercial railroads, Phila. v. Trenton R. R. Co., 6 Wharton, 25 (Pa. 1840); Montgomery v. Santa Ana R. R. Co., 104 Cal. 186 (1896), but as many states hold *contra,* Ecorse v. Jackson Ry. Co., 153 Mich. 393 (1900); Spalding v. Macomb Ry. Co., 225 Ill. 585 (1904). Horse railroads, Peddicord v. Baltimore R. R. Co., 34 Md. 463 (1870); Peterson v. Navy Yard Ry., 5 Phila. 199 (Pa. 1863). Cable railroads, Rafferty v. Central Traction Co., 147 Pa. 579 (1892). Steam motor railroads, Newell v. Minn. R. R. Co., 35 Minn. 112 (1890). Electric trolley railroads, Lockhart v. Craig St. Rd. Co., 139 Pa. 419 (1891). Subways, Sears v. Crocker, 184 Mass. 586 (1900). Sewers and drains, Leeds v. Richmond, 102 Ind. 372 (1902); Lockhard v. R. R. Co., 139 Pa. 419 (1891). Water pipes, Provost v. Chester Water Co., 162 Pa. 275 (1894). Gas pipes, King v. Phila. Co., 154 Pa. 160 (1893). Steam, electricity, *etc.,* Berks Road v. Lebanon Co., 5 Pa. C. C. 354 (1900).

On the other hand among the uses that are held to be unreasonable and therefore a taking for which compensation must be made, are those that are obviously unreasonable, such as erecting pumping works, or a mill, or a

jail in the street, Lutterloh v. Cedar Keys, 15 Fla. 306 (1860), and those which are not so obvious, such as elevated railroads and telephone and telegraph wires. The construction of an elevated railroad is considered a taking whether the abutting owner owns the fee or the city, Story v. New York Elevated Rd. Co., 90 N. Y. 122 (1882), the reason being that such takes away from the abutting owner's property right of light and air, which he had without the fee. Telegraph and telephone lines form no part of the equipment of a public highway, but are foreign to its use and therefore compensation must be made. De Kalb Tel. Co. v. Dutton, 228 Ill. 178 (1906); Jemison v. Bell Tel. Co., 186 N. Y. 493 (1901).

EVIDENCE—JUDICIAL NOTICE—LOCAL OPTION ELECTION—On an indictment for selling alcoholic liquors in territory voted "no license" under a "local option" law, the court instructed the jury, as a matter of law, without evidence having been offered on the subject, that the territory in question was "no license" territory. *Held:* The giving of the instruction was error. Judicial notice will not be taken of the result of an election under a local option law. People v. Mueller, 143 Pac. Rep. 748 (Cal. 1914).

This case is in accord with the rule obtaining in most jurisdictions that while courts will take judicial notice of the existence of a local option law, they will not do so of the result of an election held pursuant to its provisions. People v. Edwards, 174 Mich. 445 (1913); Gay v. Eugene, 53 Ore. 289 (1909). But when the statute provides that the result of such an election shall be certified to a particular court, it is held that that court may take judicial notice thereof. Rauch v. Com., 78 Pa. 490 (1875). In Maryland, it is held that when a court has once, upon proofs, found that the local option law has been adopted in a particular county, no further proof is required in any case, but all courts should take judicial notice of such decision and of the result of such election. Slymer v. State, 62 Md. 237 (1884). There are a number of jurisdictions contrary to the principal case, Thomas v. Com., 90 Va. 92 (1893); State v. Arnold, 80 S. C. 383 (1908). In Mississippi, a statute (Code, §1621) provided that courts should take judicial notice of the result of local option elections. See Irby v. State, 91 Miss. 542 (1907).

A court is expected, in general, to take judicial notice of the law of its own sovereignty; but the doctrine applies only to public or general statutes of the Legislature, State v. Turnpike Co., 65 N. J. L. 97 (1900), though occasionally it is required by statute that private or special acts also should be noticed. *E. g.* Conn. Gen. St. 1887, §1087. But the ordinances and regulations of local boards and councils are not noticed. Horne v. Mehler, 23 Ky. Law Rep. 1176 (1901). On the analogy of the latter rule, it seems that the majority view, holding local option elections not to be a matter for judicial notice, is correct.

EVIDENCE—PAROL EVIDENCE RULE—A dealer orders goods of a travelling salesman by an order in writing, with a parol condition, that the order would become operative only if the goods were delivered within a certain time. *Held:* Parol evidence is admissible to prove the condition. S. F. Bowser & Co. v. Fountain, 150 N. W. Rep. 795 (Minn. 1915).

Though the general rule that parol evidence is not admissible to vary a written instrument is firmly established, it is also recognized that where the effect of the evidence is to show that what appears to be a contract never really took effect as such, the evidence is admissible, though parol. Jamestown v. Allen, 172 N. Y. 291 (1902); Chute Co. v. Latta, 123 Minn. 69 (1913). Further, an oral agreement contemporaneous with the execution of the writing, and relating to a matter upon which the writing is silent, may be proved by parol. McNight v. Parsons, 136 Ia. 390 (1907); Gandy v. Wecherly, 220 Pa. 285 (1908). But such a collateral parol agreement is not admissible in evidence when the effect is to alter the meaning of the written instrument. Stowell v. Ins. Co., 163 N. Y. 298 (1900). The application of

these rules has led to widely conflicting decisions. Each case rests upon its own facts, as no rule can be laid down as to when the condition alters the contract and when it proves that no obligation ever became operative.

EVIDENCE—PRESUMPTIONS—The plaintiff's decedent was found dead on the tracks of a railroad five hundred feet from a public crossing. There were marks beside the rails as though made by dragging. *Held:* That before the presumption of due care can arise it must be shown as a fact that deceased undertook to cross at the proper place. Atchison, Topeka & Santa Fe Ry. Co. v. De Sedillo, 219 Fed. Rep. 641 (1915).

It is generally recognized that, in the absence of direct evidence, one injured by the negligence of another will be presumed to have acted himself with due care. Beatty v. Gilmore, 16 Pa. 463 (1854); Johnson v. Hudson River Co., 5 Duer, 21 (N. Y. 1855); Durant v. Palmer, 29 N. J. L. 544 (1862). This is based on the natural instinct of self-preservation. Scranton v. Dean, 33 Leg. Int. 281 (Pa. 1876); Indiana, *etc.*, Ry. Co. v. Otstat, 113 Ill. App. 37 (1904). It is held especially applicable to one injured while about to cross the tracks of a railroad, where there is a strong incentive to use care to discover and avoid the cars. Continental Improvement Co. v. Stead, 95 U. S. 161 (1877); Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353 (1895). So one injured at a crossing is generally presumed to have "stopped, looked, and listened". Baltimore & Potomac Ry. Co. v. Landrigan, 191 U. S. 461 (1903); Hanna v. Phila. & Reading Ry. Co., 213 Pa. 157 (1906). But in those jurisdictions where the burden of proving the absence of contributory negligence is upon the plaintiff, this presumption will not take the place of affirmative evidence, Pittsburgh, *etc.*, Ry. Co. v. Bennett, 9 Ind. App. 92 (1893); Ward v. Maine Central Ry. Co., 96 Me. 136 (1902); Rothschild v. Levy, 118 Ill. App. 78 (1905); McDonough v. Pelham Co., 98 N. Y. Supp. 90 (1906), though inferences may be drawn from the surrounding circumstances and the instinct of self-preservation may be considered. Indiana, *etc.*, Ry. Co. v. Otstat, *supra.*

But *a fortiori* a presumption must be based on an established fact. Hence the general rule that a presumption cannot be based on a presumption. Phila. City Pass. Ry. Co. v. Henrice, 92 Pa. 431 (1880); McIntyre v. Ajax Mining Co., 20 Utah, 323 (1899); Cunard Steamship Co. v. Kelley, 126 Fed. Rep. 610 (1903); Lamb v. Union Ry. Co., 125 App. Div. 286 (N. Y. 1908). Were the rule otherwise, "there would be no limit to conjecture". Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121 (1903). On the contrary, the basic fact must be proved beyond all uncertainty. U. S. v. Ross, 92 U. S. 281 (1875); Duncan v. Chicago, *etc.*, Ry. Co., 108 Pac. Rep. 101 (Kan. 1910). It is submitted that while, in the principal case, had the jury inferred that the deceased had attempted to cross at the proper place it would not have been a presumption on which to found the presumption of due care, nevertheless the case was clearly within the rule that a presumption must be founded upon an established fact.

For a comprehensive treatment of this question, see Chamberlayne's Modern Law of Evidence, §1030, and cases cited therein.

INTERSTATE COMMERCE—DUTY OF CARRIER TO COLLECT PASSENGER FARES AS FILED IN TARIFF—The agent of a railroad by mistake quoted to a passenger a lower rate than that filed with the Interstate Commerce Commission, and later sold him a passenger ticket at the rate quoted. *Held:* The railroad not only *may* but *must* collect the rate filed. Louisville & Nashville R. R. v. Maxwell (No. 181, Oct. Term, 1914, U. S. Sup. Ct. Decided Apr. 5, 1915).

This case is believed to be the first case in which the rules now well established as to freight rates have been extended to passenger rates. The theory on which the decisions have gone has been that the wording of Section Six of the Interstate Commerce Act is mandatory upon the carrier, compelling it to charge no more nor less than the tariff rate. Pa. R. R. Co.

v. International Coal Co., 230 U. S. 184, 197 (1913); B. & M. R. R. Co. v. Hooker, 233 U. S. 97, 110-113 (1914); Pierce v. Wells Fargo, 236 U. S. 278, 284 (1915). These cases have decided that the shipper is charged with notice of the rate as filed, and that no ignorance of the shipper or neglect by the carrier is any excuse to an action by the carrier to collect the full tariff rate. Though this may be a hardship on the shipper, yet it is a necessary result of the policy adopted by Congress to prevent discrimination. The present case very logically applies the same principles to the recovery of tariff passenger rate.

LIBEL—PORTRAITS—GOOD FAITH—A newspaper innocently published the wrong photograph in connection with a story of a young girl's efforts to save her father from the gallows. *Held:* A verdict for the defendant on the ground of lack of knowledge and intent to defame is error. Van Wiginton v. Pulitzer Publishing Co., 218 Fed. Rep. 795 (1915).

The liability of one who publishes libellous matter is a wide one and knowledge or bad intent is immaterial. "Whatever a man publishes he publishes at his peril," Lord Mansfield in King v. Woodfall, Lofft, 776 (Eng. 1774). So it is universally held that the publication of one's photograph by mistake in connection with libellous matter regarding another is actionable *per se*. Peck v. Tribune Co., 214 U. S. 185 (1908); Morrison v. Smith, 177 N. Y. 366 (1904). So also even where the defendant intended to refer to some fictitious person or where by similarity of names, the plaintiff is regarded as the one referred to, the lack of malice is no excuse. The test is to whom the public would reasonably think the defendant referred. Jones v. Hulton & Co., L. R. [1909] App. Cas. 20 (Eng.); Clark v. North American Co., 203 Pa. 346 (1902); Taylor v. Hearst, 107 Cal. 262 (1895); Mr. Justice Holmes, dissenting, in Hanson v. Globe Newspaper Co., 159 Mass. 293 (1893); Davis v. Marxhausen, 86 Mich. 281 (1891). It is not whom the defendant meant to defame, but whom he did defame. Farwell, L. J., in Jones v. Hulton & Co., *supra*.

For a learned discussion of the question see article by Prof. Jeremiah Smith, 60 U. OF P. L. R. 365, 461 (1912).

MARRIAGE—EVIDENCE—INTENT—A man and a woman appeared before a minister and were apparently married. A record of the marriage was made in the church register, and the certificate required to be filed with the board of health was duly filled out and signed by the minister, the parties, and two witnesses. The marriage was not followed by cohabitation. It was sought to prove by the woman's testimony that there was reserved in the minds of the parties at the time a lack of intent to marry. *Held:* This evidence was properly excluded. Barker v. Barker, 151 N. Y. Supp. 811 (1914).

It was ingeniously argued in the principal case that marriage was a civil contract, and being such, mutual assent was necessary; and that assent might be testified to by one of the parties. Though marriage is conceded to be a civil contract it is held to be much more than that. Maynard v. Hill, 125 U. S. 210 (1887); Pollock on Contracts, 3rd ed., p. 685; and no secret reservation in the mind of one of the parties will avoid it. Barnett v. Kimmell, 35 Pa. 13 (1859); Hilton v. Roylance, 25 Utah, 129 (1902). But by the law applicable to ordinary contracts, as pointed out in the principal case, intent is gathered from overt acts and such inference is unaffected by a secret mental reservation. Jackson v. Winne, 7 Wend. 47 (N. Y. 1831). Cases where there is an alleged lack of intent on the part of both parties, as in the principal case, are less numerous. It has been held that fraud upon the party performing the ceremony does not invalidate a marriage as between the parties; thus, where Protestants, through fraud, induced an official of the Roman Catholic Church to perform the ceremony. Swift v. Kelly, 3 Knapp. 257 (1835). In refusing to sanction the repudiation of such an agreement, the public policy involved is uniformly assigned as an impell-

ing reason. Maynard v. Hill, *supra,* and this though the marriage is not followed by cohabitation. Jackson v. Wynne, *supra,* which consideration becomes essential since, it is submitted, where the lack of intent is mutual, the latter decisions are not sustainable solely under the principles of contract law.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—CHOICE OF WAYS—A workman was ordered by the foreman to carry certain materials to a certain place. There were two paths which he could have taken; he choose the one more dangerous, but slightly more convenient, and was injured. *Held:* By choosing the more dangerous way when there was a safe way equally open and well known to him, he is chargeable with contributory negligence as a matter of law. American Car & Foundry Co. v. Duke, 218 Fed. Rep. 437 (1915).

This case is in accord with the universal rule that if a workman has a choice of ways and, in order to facilitate his work he chooses the shorter or easier, but more dangerous route, he cannot recover if he is injured. Galvin v. Old Colony R. Co., 162 Mass. 533 (1895); Nolan v. Schukle, 69 Mo. 336 (1879); Kinney v. Corbin, 132 Pa. 341 (1890). But where the plaintiff took an unusual but not necessarily dangerous route and was injured, it is held not to be contributory negligence, even though had he gone by the usual way he would not have been injured. Sayward v. Carlson, 1 Wash. St. 29 (1890); Salem Stone Co. v. Griffin, 139 Ind. 141 (1894). Nor is one negligent if, in going from two points of duty, he departs from the straight line between two points, provided the route selected is apparently safe. Lauter v. Duckworth, 48 N. E. 864 (Ind. 1897). But when a servant did not know that at the time of the accident he was not taking a safe position, the rule that where there are two ways open to him, one dangerous and the other not, it is his duty to use the safe way has no application. Norfolk & Western Ry. Co. v. Cheatwood, 103 Va. 356 (1905).

NEGLIGENCE—CHILD TRESPASSER—A boy of six years entered the open door of a machine shop upon a much-travelled city street, and as he watched the men at work, his hand was caught and injured by an unguarded cog-wheel. The moving machinery of the shop was visible from the sidewalk, and at different times before the accident other children had entered through the open door. *Held:* The boy's age being such as precluded him from being regarded as a trespasser, the owner of the machine shop owed him a duty to guard the place against the attractive dangers it contained. Chesko v. Delaware & Hudson Co., 218 Fed. Rep. 804 (1914).

This decision follows the doctrine laid down in Sioux City R. Co. v. Stout, 84 U. S. 657 (1873), that a person who has upon his premises dangerous objects naturally attractive to children owes a duty of care toward those children, though they be technical trespassers. Many jurisdictions follow the "attractive nuisance" doctrine. Stollery v. R. Co., 243 Ill. 290 (1910); Marchek v. Klute, 133 Mo. App. 280 (1908). Other cases repudiate the doctrine. Reid v. Harmon, 161 Mich. 51 (1910); Bottum's Adm'r v. Hawks, 79 Atl. Rep. 858 (Vt. 1911).

The general rule is that no duty exists toward trespassers except that of refraining from wantonly or wilfully injuring them. Riedel v. R. Co., 177 Fed. Rep. 374 (1910). And a child may be a trespasser upon property from the viewpoint at least of liability for his own tortious acts. Scott v. Watson, 46 Me. 362 (1859). But when the infant is seeking to recover as plaintiff instead of to escape liability as defendant many courts hold that a child of tender years cannot be a trespasser. Cincinnati R. Co. v. Dickerson, 102 Ky. 560 (1898); Donk Coke Co. v. Leavitt, 109 Ill. App. 385 (1903). The "attractive nuisance" doctrine, however, is based upon the theory that the attractiveness of the thing amounts to an implied invitation to children. Hayes v. Power Co., 95 S. C. 230 (1913); Chicago R. Co. v. Fox, 38 Ind. App. 268 (1906). But it is required that the defendant know, or in the

exercise of reasonable care ought to know, that his structure is attractive to children and endangers them. Thompson v. Telegraph Co., 127 S. W. Rep. 531 (1910).

NUISANCE—BLASTING—The defendant, in constructing a tunnel under a public street, removed earth and rocks by means of high-power explosives. The adjacent property of the plaintiff was injured by the concussion of the atmosphere resulting from the blasting operations. *Held:* The defendant was liable for the injury caused, irrespective of the question of negligence. Louden v. City of Cincinnati, 106 N. E. Rep. 970 (Ohio, 1915).

The holding of the principal case that a person causing blasting to be done is liable for injuries to the property of another caused by the jarring of the ground, irrespective of the care or skill used, is accepted in a number of jurisdictions. Cotton v. Onderdonk, 69 Cal. 155 (1886); Fitzsimons v. Braun, 199 Ill. 390 (1902); Hickey v. McCabe, 30 R. I. 346 (1910). Other States hold that when the injury is due solely to concussion it must be shown in order to recover that the work was negligently done. Page v. Dempsey, 184 N. Y. 245 (1906); Bessemer Coal Co. v. Doak, 152 Ala. 166 (1907); Settle v. Southern Ry. Co., 150 N. C. 643 (1909).

A few courts allow recovery on the ground that blasting is a nuisance. Lonytus v. Persell, 30 Mont. 306 (1904); Blackford v. Herman Const. Co., 132 Mo. App. 157 (1908); Green v. Shoemaker, 111 Md. 69 (1909). In Illinois and Ohio, the rule of Rylands v. Fletcher is applied to blasting cases. Glycerine Company v. St. Mary Mfg. Co., 60 Ohio, 560 (1889); Fitzsimons v. Braun, 199 Ill. 390 (1902). The New York rule is limited to where there has been an invasion of the property or a technical trespass. Booth v. Rome, 140 N. Y. 267 (1893); Derrick v. Kelly, 120 N. Y. S. 996 (1910). And in Massachusetts and New Jersey, the courts lay emphasis upon the fact that blasting is necessary to the performance of a public work, and therefore a city is not liable for injury resulting from the careful performance of such work. Murphy v. Lowell, 128 Mass. 396 (1880); Simon v. Henry, 62 N. J. L. 486 (1898).

PROPERTY—IMPLIED EASEMENTS—WAY BY NECESSITY—A grantor who owned two adjoining lots sold one to the defendant and subsequently sold the other to the plaintiff. There was at the time access to a building on the lot purchased by the plaintiff over a passageway at the rear of the defendant's land, which the jury found "reasonably necessary for the full, convenient, and comfortable use and enjoyment of said block". *Held:* There is no reservation of an easement in such case unless there be strict necessity. Howley v. Chafee, 93 Atl. Rep. 120 (Vt. 1915).

On the question as to whether or not an implied grant or reservation of an easement will arise on a conveyance of a part of a tract of land, the decisions are by no means uniform. In the early case of Nicholas v. Chamberlain, Cro. Jac. 121 (1606), it was laid down that a continuous easement would be implied as granted or reserved, and no distinction was made between the cases where the quasi-dominant tenement was sold first and where it was retained. In Morris v. Edgington, 3 Taunt. 24 (Eng. 1810), a grant of a non-continuous easement was implied in a case where there clearly was no necessity. Subsequently in the case of Pyer v. Carter, 1 H. & N. 916 (Eng. 1857), a reservation was implied of the right to maintain a drain hidden at the time under the ground of the granted premises. Still later, in Suffield v. Brown, 4 De G. J. & S. 185 (Eng. 1863), the court, in refusing to imply a reservation of a non-continuous easement, unnecessarily repudiated the perfectly consistent decision of Pyer v. Carter, *supra,* and approved Nicholas v. Chamberlain, *supra,* on which the latter case was based. In England Nicholas v. Chamberlain probably remains the law for continuous easements, though Pyer v. Carter has never been directly overruled. No reservation, however, of non-continuous easements is implied. Suffield v. Brown, *supra.* In theory there is much to be said for the view that the

purchaser should be held to the exercise of caution to ascertain apparent servitude and that an easement should always be created by implication in favor of the quasi-dominant land, Gale on Easements, 8th ed., p. 156; but the weight of modern authority in America and England, on the theory that a grantor cannot derogate from his own grant, refuses to imply a non-continuous easement in the case of reservation. White v. Bass, 7 H. & N. 722 (Eng. 1862), making the same distinction between implied grants and implied reservations emphasized in the principal case, and holding that such a way will be implied only in case of strict necessity. Wells v. Garbutt, 132 N. Y. 430 (1892); Crosland v. Rogers, 32 S. C. 130 (1889), when it becomes a pure question of necessity and depends upon whether, in the particular jurisdiction, "necessity" is construed as strict necessity, McDonald v. Lindall, 3 Rawle, 492 (Pa. 1827), or merely that the other way involves disproportionate labor and expense. Pettingill v. Porter, 8 Allen, 1 (Mass. 1864). The rule adopted in Pennsylvania, patterned after the civil law rule, whereby a purchaser takes subject to and receives the benefit of all obvious user, which he sees or ought to have seen, is, it is submitted, the most logical and easiest of application. Seibert v. Levan, 8 Pa. 383 (1848).

PROPERTY—STOCK EXCHANGE SEAT—A member of a stock exchange assigned his seat therein as collateral security. When he became bankrupt, the seat in accordance with the by-laws of the exchange was sold and the proceeds distributed among his creditors. The assignee of this seat claimed a right to the proceeds. *Held:* The seat is not property; as this seat was sold under the by-laws of the exchange, the assignee cannot complain. Gartner v. Pittsburgh Stock Exchange, 247 Pa. 482 (1915).

The principal case is in accord with the earlier cases in Pennsylvania, holding that a seat in a stock exchange is not property. Thompson v. Adams, 93 Pa. 55 (1880), but a mere personal privilege. Pancoast v. Gowen, 93 Pa. 66 (1880); Barclay v. Smith, 107 Ill. 349 (1883). On the other hand, the federal courts hold that a bankrupt's membership in a stock exchange is property, *In re* Gaylord, 111 Fed. Rep. 717 (1901), which passes to his trustee, *In re* Hatch & Co., 135 Fed. Rep. 504 (1905), and may be sold by the trustee as an asset of the bankrupt's estate, Page v. Edmunds 187 U. S. 596 (1903); subject, however, to the rules of the exchange that the proceeds should be appropriated to the payment of claims of other members of the exchange in preference to other creditors. *In re* Gregory, 174 Fed. Rep. 629 (1909); *In re* Currie, 185 Fed. Rep. 263 (1911). See also Bank v. Abbott, 63 N. E. Rep. 1058 (Mass. 1902); Shannon v. Cheney, 105 Pac. Rep. 588 (Cal. 1909). The New York courts though in accord with the federal courts that a seat on the exchange is property, Matter of Kellman, 174 N. Y. 254 (1903), limit the doctrine so that the proceeds of the seat are available only when the stock exchange itself disposes of the seat. Ketcham v. Provost, 156 App. Div. 477 (N. Y. 1913).

PUBLIC SERVICE COMPANIES—WATER COMPANIES—MUNICIPAL ACQUISITION UNDER CHARTER TERMS—Section Seven of the Pennsylvania Act of April 29, 1874, P. L. 73, provides for purchase, by proceedings *in invitum*, of the property and works of any water company by the municipality served thereby, which becomes a term of the charter of companies organized under that act. Art. III, §11, of the Public Service Company Law, requires the approval of the commission to all contracts between any public service company and any municipality. This section became effective July 26, 1913. Art. III, §3(a), of the same act, requires the commission's approval of the acquisition by any municipality of any plant for rendering public service of a kind already being furnished within the municipality. This section became effective January 1, 1914.

Legal proceedings were begun September 8, 1913, to acquire the property of a water company organized under the Act of 1874. *Held:* The approval

of the Public Service Commission was unnecessary. Borough of Reynoldsville v. Reynoldsville Water Co., 247 Pa. 26 (1915).

This decision necessarily involves the proposition, apparently sound, that the exercise by the municipality of its right to condemn and acquire the plant of the water company serving it, as given by the charter of the company, is not a contract with the company. On the other hand, the court recognizes, *obiter*, that a substantive modification has been made in the Act of 1874 by the Public Service Company Law requiring the Commission's approval before the municipality may exercise the right to condemn. In the principal case this did not apply, the proceedings being pending at the time the latter section went into effect. It is not retroactive unless expressly so declared. Kille v. Iron Works, 134 Pa. 225 (1890).

QUASI CONTRACTS—RECOVERY FOR PART PERFORMANCE—PLAINTIFF IN DEFAULT—The plaintiff agreed to thresh all of defendant's grain. He threshed the wheat and oats, but refused to thresh the flax. *Held:* He can recover for the value of the services rendered, irrespective of the breach. Lynn v. Seby, 151 N. W. Rep. 31 (N. D. 1915).

It is almost universal that if an agreement has been performed in part by a plaintiff and its further performance has been prevented by the act of the defendant, the plaintiff may at his option either sue for the breach and recover damages, or abandon the contract altogether and recover upon a general *indebitatus assumpsit*. Derby v. Johnson, 21 Vt. 17 (1848); Johnson v. Trinity Church, 11 Allen, 123 (Mass. 1868). In Pennsylvania the action must be on the special agreement with an averment of plaintiff's readiness to perform as an excuse for the want of actual performance. Powelton Coal Co. v. McShain, 75 Pa. 238 (1874). But the implication of a promise in all such cases is derived from the fact that the performance has been beneficial to the defendant. Allen v. Jarvis, 20 Conn. 38 (1850); San Francisco Bridge Co. v. Dumbarton Land Co., 119 Cal. 272 (1897).

On the other hand when the plaintiff is in default after partly performing his contract and the defendant is in no way to blame the law is not so certain and the courts are divided on a number of points. When there is a contract for the sale of goods and only a part is delivered the tendency of the cases is to hold that the plaintiff cannot recover in *quantum meruit* unless the defendant will not or cannot return the goods he received. Champlin v. Rowley, 18 Wend. 187 (N. Y. 1837); Button v. Turner, 6 N. H. 492 (1835); Dula v. Cowles, 7 Jones' Law (N. C. 1859). In contracts for services, which because of their nature cannot be returned, if the plaintiff wilfully refuses to complete performance of his contract the weight of authority holds that he cannot recover upon a *quantum meruit* for what he has done, because if the rule were otherwise it would encourage persons not to complete their obligations. Seaburn v. Zachmann, 99 App. Div. 218 (N. Y. 1904); Rice v. Dwight Mfg. Co., 2 Cush. 80 (Mass. 1848); Natalizzio v. Valentio, 71 N. J. L. 500 (1904). But there is considerable authority to the contrary especially among the western jurisdictions, which have adopted a ruling laid down by an early New Hampshire case, Button v. Turner, 6 N. H. 492 (1835), that "it is inequitable for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained by the nonperformance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor; and that this excess of benefit arising from the part performance of the other party, forms a new consideration upon which the law implies a promise to pay for the same and which may be recovered in *assumpsit*". Duncan v. Baker, 21 Kan. 99 (1880); Bedow v. Tonkin, 5 S. D. 432 (1893); Williams v. Crane, 153 Mich. 89 (1908). This is the view adopted by the principal case. If the plaintiff has substantially performed a contract of service, especially in building contracts in nearly all jurisdictions, he may recover on a *quantum meruit* for what he has done, provided his oversights

or minor details not performed were unintentionally overlooked. Preston v. Furney, 2 W. & S. 53 (Pa. 1841); Gillespie Tool Co. v. Wilson, 123 Pa. 19 (1888).

RELIGIOUS SOCIETIES—PROPERTY—TITLE—A congregation of a church joined the General Synod. Later a division arose in the congregation. The Synod declared this minority to be the true congregation. The minority sought to recover the church property. *Held:* Under the congregational form of church government, the majority of each congregation, not the General Synod, have the authority to direct in whom shall be the title to the church property. Gadmundson v. Thingvalla Church, 150 N. W. Rep. 750 (N. D. 1915).

The English view that civil courts must decide for themselves all questions of creed, Atty. General v. Pearson, 3 Meri. 353 (Eng. 1817), has never received judicial sanction in America. Watson v. Jones, 13 Wall. 679 (U. S. 1871). The American courts will determine ecclesiastical questions only when civil or property rights are involved. White v. White, 89 Ind. 136 (1883). And then the decision thereon of the proper church tribunal is generally accepted as final. Watson v. Jones, *supra*. Where the form of government of a religious society is congregational, the power to determine the property rights of the respective factions in case of a mere division in the congregation is in the majority of the congregation. Brook v. Yoder, 14 Ky. L. R. 863 (1893); *In re* Aitken, 158 Pa. 541 (1893); but where a schism arises in the congregation the title to the church property will remain in that faction which adheres to the doctrines originally taught by the congregation. Christian Church v. Church of Christ, 76 N. E. Rep. 703 (Ill. 1906); Hadley v. Mendenhad, 89 Ind. 136 (1883), even though the adherents to the former doctrines are in a minority. Lemp v. Raven, 71 N. W. Rep. 627 (Mich. 1897); Bose v. Christ, 193 Pa. 13 (1899). Where a mere division arises in a congregation governed by a federated or denominational form of church government the legal title to the church property is in that faction recognized by the highest judiciary of the denomination. Reist v. Murphy, 131 N. W. Rep. 946 (Neb. 1911), whether it be the majority or the minority. Krecker v. Shirey, 163 Pa. 534 (1894). If there is attached to the property a trust that a particular form of worship be observed those who adhere to the purpose of the trust are entitled to the property. Nance v. Busby, 91 Tenn. 303 (1891), even though the congregation is under the congregational form of religious government. Baker v. Fales, 16 Mass. 488 (1819).

SALES—CONDITIONAL SALE—REMEDIES OF SELLER—ELECTION—A safe was sold on the condition that the title was to remain in the vendor until the purchase price was paid. Only part of purchase price having been paid the vendor brought an action for the balance. *Held:* He thereby waived his right to a return of the safe. Waltz v. Silveira, 145 Pac. Rep. 169 (Cal. 1915).

Where by contract of sale the seller retains title until the purchase price is paid, he may, if vendee fails to pay, either retake the property, Plow Co. v. Rodgers, 37 Pac. Rep. 111 (Kan. 1894), or bring an action to recover the purchase price, Bailey v. Harvey, 135 Mass. 172 (1883); but the latter proceeding affirms the sale, Smith v. Barber, 53 N. E. Rep. 1014 (Ind. 1899), and waives the right to a return of the property, Buller v. Dodson, 98 Ark. 569 (1906). Recovery of the goods bars a subsequent action to recover the purchase price, Mfg. Co. v. Casselius, 76 N. W. Rep. 1028 (Miss. 1898); White v. Gray, 96 App. Div. 154 (N. Y. 1905); Bierer v. McLaughlin, 165 Pa. 150 (1895). But an action on one of the purchase money notes is not such an election of remedies as will prevent the vendor from asserting title to the property, Ratchford v. Warehouse Co., 145 N. Y. Sup. 83 (1914). A few jurisdictions are not in accord with this principal. They take the view that a vendor selling on a condition that title remains in him until purchase price is paid does not lose title by suing and recovering judgment for purchase price, Press Co. v. Pub. Co., 56 N. J. L. 676 (1894), unless the judgment has been paid, Piano Co. v. Wilson, 144 Ala. 586 (1905); Typograph Co. v.

Masgurn, 78 N. W. Rep. 542 (Mich. 1899), and that an action to retake the goods will not bar a subsequent suit to recover the purchase price, Diderick v. Wolfe, 68 Miss. 500 (1891).

TRUSTS—RESULTING TRUST—A husband bought certain land and paid the purchase money, but took title in the name of his wife. *Held:* The presumption is that the conveyance was made as a gift or advancement, and the burden is on the husband to establish a resulting trust. Dodge v. Thomas, 107 N. E. Rep. 261 (Ill. 1914).

When property is purchased and the conveyance of the legal title is taken in the name of one person, and the consideration is paid by another, not in the way of a loan to the grantee, a resulting trust arises in favor of the person paying the purchase price, and the holder of the legal title becomes a trustee for him. Willis v. Willis, 2 Atk. 71 (Eng. 1740). The rule, however, applies only where the parties are strangers in the eyes of the law. If the purchaser takes the conveyance in the name of a wife or child or other person for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises that the purchase and conveyance were intended to be an advancement or gift for the nominal purchaser. De France v. Reeves, 125 N. W. Rep. 655 (Ia. 1910); McKey v. Cochran, 262 Ill. 376 (1914). But whether a purchase in the name of a wife or child is an advancement or not is a question of pure intention, though presumed *prima facie* to be a provision and settlement; therefore any relevant evidence may be received either to rebut or to support the presumption. McKey v. Cochran, *supra.*

On the other hand, no presumption of a gift or advancement arises when a wife furnishes the purchase money for property and the title is taken in the name of the husband, and a resulting trust arises in favor of the wife. Wright v. Wright, 242 Ill. 71 (1909). In Pennsylvania, however, the opposite rule prevails. Where a wife furnishes the purchase money and title is taken in the husband's name, a presumption of a gift to him arises, Orr v. Orr, 22 Pa. Dist. Rep. 887 (1913); and this presumption must be clearly rebutted in order to establish a resulting trust in favor of the wife. Byers v. Ferner, 216 Pa. 233 (1907).

WILLS—CONSTRUCTION—"CHILDREN"—A testator gave certain real estate to his son, "during his natural life, and after his death to his children surviving him in fee." *Held:* "Children" does not include "grandchildren". Akman v. Walters, 106 N. E. Rep. 879 (Ind. 1915).

This case is in accord with the general rule that the word children used in a will is used in its popular significance and does not include grandchildren. It embraces only the first generation of offspring and can acquire a more extensive meaning only from the context in which it occurs. West v. Russman, 132 Ind. 278 (1893); Willis v. Jenkins, 30 Ga. 167 (1860). But the term children might include issue however remote and would be held to do so whenever the reason of the will so demanded. Prowitt v. Rodman, 37 N. Y. 42 (1867), as, for example, from necessity, when the will would otherwise be inoperative or when the testator has shown by other words that he did not use the word in its ordinary and proper meaning, but in a more extended sense, or when the word children was used as synonymous with the word heirs. Hughes v. Hughes, 51 Ky. 115 (1851). The word will not be held to include grandchildren whose parents were dead at the time the will was executed. Pugh v. Pugh, 105 Ind. 552 (1886). But see *In re* Schedel, 73 Cal. 594 (1887), where the testator knew that his child was dead. A bequest to the children of one's child extends equally to the children of a second marriage, even though entered into after one's death. Appeal of Jones, 48 Conn. 60 (1880). The word children does not, however, include step-children. Lawrence v. Hebbard, 1 Bradf. Sur. 252 (N. Y. 1850), nor adopted children. Russell v. Russell, 84 Ala. 48 (1887). But where they are referred to as adopted children they take under a will even though their

adoption was invalid, 66 N. E. Rep. 1073 (Ill. 1903). Illegitimate children do not take as a class under children. Heater v. Van Auken, 14 N. J. Eq. 159 (1861), but otherwise where children have been subsequently legitimized by marriage of parents. *In re* Schneider's Estate, 4 Leg. Op. 634 (Pa. 1872). Where provision is made in a will for illegitimate children it raises the necessary implication that testator, in further provision by the term children did not include them. Heater v. Van Auken, *supra.* Illegitimate children may take under the word children where there are no legitimate children to whom the term might be applied. Gardner v. Heyer, 2 Paige, 11 (N. Y. 1829); also where the testator's intention is manifest. Stewart v. Stewart, 31 N. J. Eq. 398 (1879). As to posthumous children the courts will construe testamentary expressions to include all children living at the death of the testator, including children *en ventre sa mere* whenever it can be done. Conn. v. Conn., 1 Md. Ph. 212 (1848). See also Adams v. Logan, 22 Ky. 175 (1827).

WILLS—IMPLICATION OF CROSS REMAINDERS—A testator gave and bequeathed the balance of his property to be divided equally betwixt his two daughters during their natural lives and then to his legal descendants. *Held:* The daughters take life estates with cross remainders, and the vesting of the gift to the descendants is postponed until the death of both daughters. Hadcox v. Cody, 108 N. E. Rep. 84 (N. Y. 1915).

The theory of implication of cross limitations is to prevent an intestacy and the general rule is that the court will imply them whenever it is necessary for this purpose. 1 Jarmin on Wills (6th edition) 660. Whenever there is a gift to a class for life or in tail, if it clearly appear that the testator thought he was disposing of his entire estate and yet that he did not intend to have the gift over take effect until the estates for life or in tail had failed, the only way in which this can be accomplished is by implying cross remainders in favor of the first takers.

In the principal case there is some little difficulty in determining just when the testator intended the gift over to his "descendants" to take effect. If he meant it to vest as separate remainders following each life estate, then there is no possibility of an intestacy and hence no occasion to imply a cross remainder. If, however, the testator desired the whole fund to go over to his descendants in one lump, at the death of the surviving daughter (and this is the construction which the court puts upon the language), then on the death of the first daughter there would be an intestacy as to her share unless a cross remainder were implied in favor of the other daughter for life. Thus, when the testator's meaning is determined, there is no doubt that the case is a proper one for the application of the rule of cross limitations. Ashley v. Ashley, 6 Sim. 358 (Eng. 1833).

WILLS—REVOCATION—CANCELLATION—That the envelope in which the testator had sealed his will was found to have been opened, that lines drawn through the bequest in question were of a different kind than those used by the testator to revoke other parts of the will, that a subsequent codicil referred to all other revocations, but not to the one in question, and that the will had been kept in a chest to which the testator's wife had the only key, is not enough to overcome the presumption that the testator himself made the cancellation. Wood's Estate, 247 Pa. 377 (1915).

Where a will has been seen last in the possession of the testator and cannot be found upon his death, a presumption arises that he himself revoked it by destruction. Cheever v. North, 106 Mich. 390 (1895); McIntosh v. Moore, 53 S. W. Rep. 611 (Texas, 1899); *In re* Fallon's Estate, 214 Pa. 584 (1906), and this presumption may be overcome only by strong and positive evidence. Thomas v. Thomas, 129 Iowa, 159 (1905); *In re* Calvert's Estate, 30 Mont. 461 (1905). So also where a will is found among the testator's papers or comes from other proper custody, and contains erasures and cancellations, the presumption is that they were made by the testator. *In re*

Thomas' Will, 70 Minn. 237 (1899); McIntyre v. McIntyre, 120 Ga. 67 (1904); Holcombe v. Holcombe, 39 N. J. Eq. 592 (1885). The mere suspicion that another might have made the changes will not overthrow the presumption. Stewart's Estate, 149 Pa. 111 (1892). The general rule requires proof that the will had been in the exclusive possession of the testator up until his death. Throckmorton v. Holt, 180 U. S. 552 (1900); Stevens v. Stevens, 72 N. H. 360 (1903). In the principal case the court recognized the customary requirements, but found that the testator's easy access to the will really gave him possession and that the other circumstances were not enough to overthrow the usual presumption.

For the rule that lines drawn through a clause are sufficient "cancellation", see Evans' Appeal, 58 Pa. 238 (1868).